UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA,	*	
	*	
v.	*	
	*	Criminal Action No. 16-30044-MGM-15
RICHARD ROSARIO,	*	
	*	
Defendant.	*	

MEMORANDUM AND ORDER REGARDING
MOTION FOR SANCTIONS
(Dkt. No. 903)

October 10, 2019

MASTROIANNI, U.S.D.J.

Presently before the court is a Motion for Sanctions filed by Richard Rosario ("Defendant") in which he asserts the government violated Local Rule 116.2(b)(1)(C), which requires production of any promises, rewards, or inducements "given to any witness whom the government anticipates calling in its case-in-chief," along with the name of the witness. According to Defendant, the government anticipated calling certain cooperating defendants ("A" and "B") "at an early stage of the litigation" and, as a result, the government was required to provide the disclosure under L.R. 116.2(b)(1)(C) "sometime in August, 2018." (Dkt. No. 903 at 3-4.) Defendant also points to a May 29, 2019 letter from the government as demonstrating that "the government was intentionally withholding [the L.R. 116.2(b)(1)(C)] information in the hope that without it Defendant would decide to plead guilty." (*Id.* at 4.) Defendant seeks, as a sanction, that the court preclude A and B from testifying as witnesses at trial. In response, the government argues there has been no violation

of L.R. 116.2(b)(1)(C) and, even if there were, Defendant's requested sanction should be denied because the government did not act in bad faith and Defendant suffered no prejudice. For the following reasons, the court will deny Defendant's motion.

Local Rule 116.2(b)(1)(C) provides:

> Unless the government invokes the declination procedure under L.R. 116.6, the government must produce to the defendant exculpatory information in accordance with the following schedule: . . . within the time period designated in L.R. 116.1(c)(1),[1] or by any alternative date established by the court: . . . a statement whether any promise, reward, or inducement has been given to any witness whom the government anticipates calling in its case-in-chief, identifying by name each such witness and each promise, reward, or inducement, and a copy of any promise, reward, or inducement reduced to writing.

L.R. 116.2(b)(1)(C). Defendant concedes there is no obligation to provide this disclosure until the government "anticipates calling" the prospective witness in its case-in-chief. The dispute is over the proper interpretation of "anticipates" and how it applies to the facts here.

The court concludes "anticipates," as used in L.R. 116.2(b)(1)(C), means the government "expects" or "plans" to call the individual as a witness, based on either a substantial likelihood or certainty, rather than mere speculation or possibility. Although the parties cited no caselaw construing this language in the Local Rules, and the court found very little,[2] cases interpreting the plain meaning of "anticipates" or "anticipation" in other contexts provide support for the court's conclusion. *See UMB Bank, Nat'l Ass'n v. Airplanes Ltd.*, 260 F. Supp. 3d 384, 396 (S.D.N.Y. 2017) ("Courts analyzing the meaning of 'anticipate' in different contexts have found that the plain or common definition of the word requires, at a minimum, at least some degree of probability that extends beyond hypothetical possibility—that is, a degree of likelihood that gives rise to a reasonable

[1] The time period set forth in Local Rule 116.1(c)(1) is "within 28 days of arraignment." L.R. 116.1(c)(1).

[2] The one case the court did find, *United States v. Jordan*, 2010 WL 625280, at *4 (D. Mass. Feb. 23, 2010), appears to support this court's interpretation. The court in *Jordan* explained: "The Local Rules provide for the disclosure of 'reliability' information only with respect to a 'witness whom the government anticipates calling in its case-in-chief.' . . . In other words, reliability information may be exculpatory, but only with respect to testifying witnesses." *Id.* (internal citation omitted).

expectation."); *Al-Kasid v. L-3 Commc'ns Corp.*, 2013 WL 1688851, at *7 (E.D. Mich. Apr. 18, 2013) ("[T]he Court finds that it is more reasonable to interpret the term 'anticipate' as meaning 'looking forward to as certain' or 'expect' . . . ."); *Cyze v. Banta Corp.*, 2009 WL 2905595, at *3 (N.D. Ill. Sept. 8, 2009) ("The connotation implicit in each of these definitions requires a knowledge of a certain future event and not mere speculation about a possible event. To act in anticipation of something requires an awareness of a future event and a preparation for it."); *see also United States v. Hopson*, 39 F.3d 795, 803 (7th Cir. 1994) ("The word *anticipate* is defined as 'to feel or realized beforehand; foresee.' *American Heritage Dictionary*, 2d ed. 1982, p. 115. Therefore, the defendant was advised that he could *anticipate*, meaning in the future he court *expect*, the imposition of a custodial sentence of five years duration in a federal penitentiary . . . .").

Defendant's counsel argued at the hearing that "anticipates calling in its case-in-chief" should be interpreted similar to the phrase "is or may be called" in the DOJ Justice Manual. *See* U.S. Dep't of Justice, Justice Manual § 9-5.001(D)(2). Defendant also argued, in a post-hearing brief, that the word "anticipates" appears less definite than the word "intends." (Dkt. No. 958 at 1.) These comparisons, however, strengthen the court's interpretation. The Local Rules could have used less definitive language, such as "may" (as used in the Justice Manual) or "possible," but it did not. Instead, by using the word "anticipates," the Local Rules signaled more certainty regarding a potential witness's testimony than these alternatives. Moreover, the court disagrees that the phrase "intends to call" is more definite than "anticipates calling"; if anything, "intends" seems slightly less definite, perhaps a bit closer to "possible" than "certain" in comparison to "anticipates."

The larger context also supports the court's interpretation. The court agrees with Defendant, as a general matter, that in many cases there are often witnesses or evidence so central to the government's case that it can reasonably be said the government "anticipates" using such evidence in its case-in-chief from the very start and, therefore, must disclose it within 28 days of

arraignment. However, as the government argues, that is not always the case. In a case such as this, for example, with a large number of co-defendants, the government's trial strategy will likely be more fluid. Moreover, the government often has to take many steps after a cooperating witness proffers a statement to further investigate and verify the information before deeming it trustworthy or deciding to use it in its case-in-chief. In addition, as the government argues, L.R. 116.2(b)(1)(C) should not be construed in such a way as to encourage over-disclosure of merely speculative witnesses, or "red herrings," whom defendants may spend valuable time investigating though they are unlikely (at that point) to be called as witnesses in the government's case-in-chief. Therefore, when the government does not yet actually anticipate calling a particular witness in its case-in-chief, the disclosure obligation set forth in L.R. 116.2(b)(1)(C) is not triggered 28 days after arraignment. Rather, it would be governed by the government's ongoing duty to supplement under L.R. 116.7 once the government truly does "anticipate" calling the witness. *Cf.* Amy Baron-Evans, *New Local Rules for Discovery in Federal Criminal Cases*, Boston B. J., April 1999, at 8 ("[B]ecause defendants typically do not decide until conducting further investigation what materials they intend to introduce as evidence in chief at trial, the appropriate vehicle for reciprocal discovery often will be the continuing duty to disclose and supplement provided by L.R. 116.7.").

The court finds this case fits within the latter scenario wherein the government subsequently "anticipates" calling witnesses in its case-in-chief after the initial 28-day window. Specifically, based on the largely undisputed facts and timeline set out in Defendant's papers and the content of the May 29, 2019 letter from the government sent to Defendant's counsel, the court finds the government did not anticipate calling A and B in its case-in-chief until June 19, 2019. As that letter explained, the government had evidence that Defendant worked for the drug trafficking organization "for a substantial period prior to the time of your client's arrest in September of 2016," which evidence came, "in part, from cooperating defendants." (Dkt. No. 954, Ex. 2 at 1.) In the very

next line, the letter states: "The government, however, has an interest in protecting the identity of those cooperating defendants." (*Id.*) "Therefore," the letter continued, "the government is willing to consider a guidelines range based solely on evidence *not* derived from cooperating defendants, but only if your client accepts responsibility prior to" June 19, 2019, when the government would make its L.R. 116.2(b)(1)(C) disclosure (in the event Defendant did not take the offer). (*Id.* (emphasis added).) Accordingly, the May 29, 2019 letter makes clear—and Defendant has not established otherwise—that the government did not anticipate calling A and B in its case-in-chief at that time because it did not want to disclose their identities at trial. By offering a disposition based solely on evidence not derived from those cooperating defendants, the government could further its interest in protecting their identities while not running afoul of its discovery obligations as to promises, rewards, or inducements under the Local Rules, because the hypothetical case-in-chief under the government's proposal would not include the testimony of A and B—it would instead be based on other evidence.[3] Although the government's May 29, 2019 letter certainly put Defendant in a difficult position, the court does not find that it exceeded the boundaries of fair dealing. Furthermore, if A and B had offered information to the government that was *exculpatory* (as opposed to inculpatory) for Defendant, then it would have been required to disclose that information under L.R. 116.2(b)(1)(A).

Granted, it is important that the government not be allowed to unfairly leverage defendants who are in the dark about what evidence may be dropped on them if they do not fold. In this case, however, it is clear the government did provide Defendant, prior to the May 29th letter, with

[3] As a result, this is not the type of situation discussed in *United States v. Hastings*, 847 F.2d 920, 928 n.8 (1st Cir. 1988) ("We agree fully with the district court that it would have been an intolerable travesty had the defendant pled guilty before learning about the rewards and inducements evidence which the government possessed." (citing *United States v. Hastings*, 667 F. Supp. 888, 900 n.3 (D. Mass. 1987))), because, had Defendant accepted the government's offer, he would not have been pleading guilty on the basis of the information provided by the undisclosed cooperating defendants. Rather, the guilty plea would have been based on other, less inculpatory evidence.

information concerning the general nature of the evidence from cooperating defendants.[4] This type of ongoing, informal dialogue between the government and defense counsel is consistent with the general spirit of the Local Rules with regard to criminal discovery. *See generally* Report of the Judicial Members of the Committee Established to Review and Recommend Revisions of the Local Rules of the United States District Court for the District of Massachusetts Concerning Criminal Cases (Oct. 28, 1998). Most importantly, Defendant has not established that the government anticipated A and B would be testifying in its case-in-chief as of May 29, 2019 or any time before then.

However, as of June 19, 2019, according to the clear terms of the May 29th letter, the government did anticipate calling A and B as witnesses. On that date, the government's offer to Defendant expired—whether or not Defendant responded—and the government made clear it intended to rely on the full scope of the evidence derived from these cooperating defendants. The government argues it did not actually anticipate calling A and B as witnesses until August 19, 2019, but it has provided essentially no explanation for the two-month gap. As Defendant argues, L.R. 116.2(b)(1)(C) cannot just mean disclosure is due whenever the government gets around to drafting its witness list. Rather, it must be based on the actual time when the government reasonably anticipates it will be using the evidence in its case-in-chief. Again, based on the largely undisputed facts here and the definitive language used in the May 29th letter, the L.R. 116.2(b)(1)(C) disclosure obligation was triggered on June 19, 2019.

[4] For example, on February 15, 2019, the government emailed Defendant's counsel a copy of a report from a government agent discussing, in general terms, cooperating defendants and the information implicating Defendant. (Dkt. No. 954, Ex. 1.) Among other information, the report stated: "Each of these [cooperating defendants] has stated that they had observed, and some had worked alongside, [Defendant] at the heroin mills being overseen by Alberto Marte dating back as far as June of 2015. These [cooperating defendants], should the government choose to enter into cooperation agreements, can testify that [Defendant] was working the heroin mills for the Marte organization, in at least three different locations, between the fall of 2015 and [Defendant's] arrest in September 2016." (*Id.* at 2.)

It is undisputed that the government did not make these disclosures until August and September of 2019. The court finds, therefore, that the government violated L.R. 116.2(b)(1)(C) by failing to timely provide the disclosures.

Nevertheless, the court denies Defendant's specific request for a sanction of precluding A and B from testifying—the only sanction Defendant seeks. Defendant has not established prejudice which would justify such a sanction. Most importantly, the timing of the disclosures in relation to trial does not support Defendant's requested sanction. Defendant's counsel agreed at a status conference on September 4, 2019 (after the filing of this motion for sanctions) to a November 19, 2019 trial date. (Dkt. No. 925.) The government thus provided its disclosures over two months before the trial. Relatedly, Defendant has not requested a continuance of that trial date. "When discovery material makes a belated appearance, a criminal defendant must ordinarily seek a continuance if he intends to claim prejudice," and "a defendant who does not request a continuance will not be heard to complain on appeal that he suffered prejudice as a result of late-arriving discovery." *United States v. Sepulveda*, 15 F.3d 1161, 1178 (1st Cir. 1993). Defendant's counsel also has not shown how his trial strategy has been affected by the discovery violation. *See United States v. Casas*, 356 F.3d 104, 114 (1st Cir. 2004) ("In cases of delayed disclosure, 'the test is whether defendant's counsel was prevented by the delay from using the disclosed material effectively in preparing and presenting the defendant's case.'" (quoting *United States v. Villarman-Oviedo*, 325 F.3d 1, 13 (1st Cir. 2003)); *see also United States v. Devin*, 918 F.2d 280, 290 (1st Cir. 1990) ("[T]he critical inquiry is not why disclosure was delayed but whether the tardiness prevented defense counsel from employing the material to good effect."). Lastly, the court finds the government did not act in bad faith in delaying disclosure. Rather, as discussed at the hearing, the delayed disclosure was merely the result of a different interpretation of L.R. 116.2(b)(1)(C) and inadvertence.

Accordingly, because Defendant has only requested that the court preclude A and B from testifying at trial as a sanction for the discovery violation, and the court finds such a sanction is not warranted under these circumstances, the court DENIES Defendant's Motion for Sanctions (Dkt. No. 903).

/s/ Mark G. Mastroianni
MARK G. MASTROIANNI
United States District Judge